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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1066

EUGENE ENSLIN,

Petitioner,

v.

J. W. BEAN, Superintendent,
New Hanover County Prison Unit,
North Carolina Department of
Correction,

Respondent.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

Petitioner is compelled to file this reply to respondent's brief in opposition to the petition for writ of certiorari to rebut a point respondent raises in his brief which is factually and legally incorrect and potentially misleading to the Court in its consideration of the petition.

Argument

Petitioner contends that this case presents for the Court's resolution for the first time "the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults," Carey v. Population Services International, 431 U.S. 678, 52 L. Ed. 2d 675, 687, n.5 (1977), which "the Court has not definitely answered." Id.

Respondent's brief in opposition to the petition for certiorari contends that this is not a case involving adult sexual conduct, since, respondent contends, he is not aware of any statutory or case law in North Carolina which establishes the age of consent for acts of sodomy or other related acts at seventeen. Thus he contends that the case involves whether a state may constitutionally use its criminal statutes to prohibit pandering homosexual favors to minors.

The statute before the Court in this case, the "crime against nature" statute, is not, of course, one which seeks to prohibit "pandering homosexual favors to minors," nor was petitioner prosecuted for violation of any such statute. It is also clear from the record in this case that the complaining witness sought out petitioner for sexual activity, upon the instigation of the local police, and that it was not the petitioner who sought out the complainant.

Furthermore, if the complaining witness, a seventeen year old member of the Marine Corps had himself been charged with "the crime against nature," he would have been tried as an adult and not as a juvenile. At the time the sexual activity took place, the juvenile juris-

diction of the North Carolina courts included only persons who had not reached their sixteenth birthday. In felony cases, such as the present one, even a fourteen or fifteen year old could be tried as an adult at the court's discretion. North Carolina Gen. Stats. § 7A-278-80 (1969)

Even after the general jurisdiction of the juvenile courts was increased in 1975 to include "any person who has not reached his eighteenth birthday, the complaining witness here, had he been charged, would have been tried as an adult since the definition of "child" expressly excludes "a member of the armed services of the United States." North Carolina Gen. Stats. § 7A-278 (1975 Supp.)

Other statutes evidence North Carolina's policy of confining the prohibition of sexual activity between adults and minors to a proscription of activity between adults and persons under sixteen or even only under twelve. Thus, the North Carolina contributing to delinquency statute, North Carolina Gen. Stats. § 14-316.1 (1975 Supp.) provides that a person is guilty of the offense if, inter alia, he or she engages in sexual intercourse with a child under 16 years of age. The North Carolina equivalent of the offense generally characterized as "statutory rape," that is, sexual relations, whether or not there was consent, with a person below a certain age, provides that the offense consists of carnally knowing a female under 12 years of age. N.C.G.S. 14-21 (1977 Supp.). Similarly, it is a misdemeanor for a female to carnally know a male under the age of 16, whether there is consent or not. N.C.G.S. 14-26 (1969). Thus, the statutory pattern clearly indicates that the complaining witness

here is an adult for the purposes of consensual sexual conduct.

Further, petitioner here was not prosecuted for child abuse, corrupting the morals of a minor or any other comparable crime.

Finally, this Court's holding in Carey v. Population Services International, supra, invalidating New York's ban on the sale of contraceptives to persons under sixteen years of age undercuts respondent's argument that petitioner's consensual relations with a seventeen year old member of the Marine Corps who sought petitioner out for such conduct, at the request of the police, would not come within whatever protection is to be afforded to private sexual conduct among consenting adults.

Conclusion

For the foregoing reasons and the reasons set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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